

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

LARON VERDELL NEWMAN,

Defendant-Appellant.

UNPUBLISHED
February 21, 2003

No. 236362
Wayne Circuit Court
LC No. 00-004874

Before: Gage, P.J., and Wilder and Fort Hood, JJ.

PER CURIAM.

Defendant appeals by right his conviction of criminal sexual conduct in the fourth degree, MCL 750.520e, following a jury trial. We affirm.

I. Facts and Proceedings

On January 18, 2000, Donna Goines discovered that shingles from the roof of her home in Detroit had fallen to the ground near the back door. The shingles had fallen from an area of the roof near the window in the bedroom of her fourteen-year-old step-daughter, the victim in this case. Goines reported the problem to her husband and, later that day, went upstairs to check the bedroom window, which had previously been nailed shut, as had the windows in the other upstairs bedrooms, to prevent the younger children in the family from going out onto the roof. Goines discovered that the nails had been removed from the window.

When Goines questioned her step-daughter about the window, she initially stated that she removed the nails because she just wanted to open the window, but she eventually told her parents that she removed the nails so that defendant, her older brother's friend, could enter her bedroom. Since September 1999, she had been permitting defendant, who was twenty-three years old, to enter her bedroom through the window very early in the morning. She testified that she and defendant had sexual intercourse four or five times during the period between September and December 1999, each time in her bedroom, and that she performed oral sex on defendant approximately two times during that time period. She also testified that defendant ejaculated each time they had intercourse. Defendant had been a friend of the victim's brother since earlier that year and frequently spent the night at the Goines residence, sleeping on the couch downstairs. The victim believed that she was in love with defendant. She also testified that she initially withheld from her parents the true reason for opening the window because defendant was in the house when they questioned her. After he left, she told them the truth.

After learning what had been happening, Goines contacted the police, who came to the home and interviewed the victim. Several days later, Goines was cleaning the victim's bedroom and discovered condoms in open wrappers under the mattress of the victim's bed. The victim testified that defendant had used a condom on two occasions, and because she did not want the condoms to be discovered in the trash, she put them under the mattress.

Officer Nigel Villarreal of the Detroit Police Department went to the Goines residence with his partner, Officer Wendy Sierra, on January 18, 2000 in response to a reported rape. Officer Villarreal testified that he observed shingles that had fallen from the roof of the house near the back of the residence. Officer Sierra interviewed the victim and learned from her that the last date that she had intercourse with defendant was December 26, 1999.

Officer Luis Caban, also of the Detroit Police Department, testified that in response to a "person wanted" call, he went to the Goines' residence around 8:00 p.m. on January 21, 2000 and found Goines on the front porch of her home indicating that defendant was across the street, walking toward the Goines' house. Officer Caban and his partner, Officer Mark Salazar, detained defendant and placed him in their squad car without handcuffs while they tried to find out what was happening. Officer Salazar stayed in the car with defendant while Officer Caban went into the house and spoke with Goines and the victim.

Goines and the victim took Officer Caban upstairs to the victim's bedroom and handed him a plastic sandwich bag containing a postcard, an envelope, and the used condoms that Goines had discovered in the victim's bedroom. Officer Caban labeled this evidence and subsequently delivered it to the sex crimes unit. The victim told Officer Caban that the last time defendant had used a condom was in October or November and that defendant stopped using condoms because he wanted the victim to have his child. She also reported to him that on one occasion, defendant came to her window, asked her to leave with him, which she did, and after they had intercourse, she returned home around 5:30 a.m. Before leaving the Goines residence, Officer Caban contacted the sex crimes unit and was instructed to take defendant to the sex crimes unit. He and Officer Salazar transported defendant according to these instructions, but defendant was later released.

Cathy Carr, a forensic serologist for the Detroit Police Department testified that she examined the contents of the plastic bag that Officer Caban had collected and found one red Trojan condom wrapper containing one latex condom. The wrapper had been opened and it was apparent that the condom had been used. Both the condom and the wrapper tested negative for the presence of blood or semen, but the outside of the condom had a brownish sticky substance on it that Carr believed to be peanut butter. The envelope also contained one gray Life Styles condom wrapper containing one latex condom and one blue Trojan condom wrapper that was empty. The condom in the Life Styles wrapper also tested negative for semen or blood, but had some of the same brownish sticky substance on it that Carr believed was peanut butter. Carr testified that if the male does not ejaculate, semen or blood will not always be found on a used condom. If the male does ejaculate, however, some trace evidence of semen will be left behind that can be detected even years after the condom was used. Carr did not test the condoms for skin cells to determine if they had been worn.

Investigator Andrew Sims of the Detroit Police Department testified that he interviewed defendant on February 3, 2000. After being read his rights and signing a statement indicating

that he understood his rights, defendant consented to questioning. He subsequently wrote a statement based on what he told Investigator Sims. Defendant's written statement denied that he ever had intercourse with the victim, and indicated that on one occasion, the victim woke him up because she wanted to perform oral sex on him, and that after she started to do so he stopped her.

Officer LaRosa from the sex crimes unit of the Detroit Police Department, the officer in charge of this case, testified that she observed Investigator Sims' interview from another room and then asked defendant some follow up questions. Officer LaRosa recorded her questions and defendant's responses in a writing. According to Officer LaRosa, defendant told her that in October he was sleeping on the couch in the Goines' front room, that the victim woke him up, said she wanted to show him something, and then started performing oral sex on him, but that he made her stop. According to defendant, the incident lasted "about 20 seconds," and it never happened again. Officer LaRosa asked defendant why he didn't give this information to the officer on the night he was arrested, and defendant responded, "Because I wanted to avoid it."

Officer LaRosa also testified that she had interviewed the victim and Goines on January 21, 2000 around 3:00 p.m. and that neither of them mentioned that they had condoms that defendant had used.

Defense counsel rested without calling witnesses to testify on defendant's behalf. During closing arguments, the prosecution asked the jury to convict defendant as charged of count one, criminal sexual conduct in the third degree, sexual intercourse, and count two, criminal sexual conduct in the third degree, fellatio. Defense counsel attacked the victim's credibility, emphasizing that the condoms revealed no evidence of ejaculation even though the victim stated that defendant ejaculated each time they had intercourse. The trial court instructed the jury on the elements of third degree criminal sexual conduct as well as the lesser charge of fourth degree criminal sexual conduct, and the verdict form permitted the jury to convict the defendant as charged on each count, to convict on the lesser charge of fourth degree CSC on each count, or to find the defendant not guilty. After concluding its deliberations, the jury returned a verdict of not guilty on count one, but guilty of fourth degree criminal sexual conduct on count two. Defendant was later sentenced to one to two years' imprisonment.

Defendant now raises three issues on appeal. First, he argues that the introduction of Officer LaRosa's testimony concerning his post-arrest silence violated his constitutional due process right to remain silent. Second, he claims that his trial counsel rendered ineffective assistance when she failed to object to the evidence concerning defendant's post-arrest silence. Third, defendant argues that the evidence concerning the seizure and forensic testing of the condoms was inadmissible.

II. Standard of Review

We generally review de novo questions of constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). However, because defendant did not object to the introduction of Officer LaRosa's testimony, defendant has forfeited this issue unless he demonstrates a plain error that affected his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Our review of defendant's ineffective assistance of counsel claim is limited to mistakes apparent on the record because defendant neither raised this issue in the trial court by requesting a *Ginther*¹ hearing or a new trial based on ineffective assistance of counsel, nor made a timely motion in this Court to remand the case to the trial court for that purpose.² *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Finally, we generally review a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Manser*, 250 Mich App 21, 31; 645 NW2d 65 (2002). In this instance, however, because defendant did not object to the introduction of the testimony, our review is limited to whether there was plain error that affected defendant's substantial rights. *Carines, supra* at 763-764.

III. Analysis

Defendant claims that his due process rights were violated when the prosecution elicited Officer LaRosa's testimony that defendant did not give the arresting officer the statement he gave during his subsequent February 3, 2000 interview. We disagree.

As our Supreme Court stated recently in *People v Dennis*, 464 Mich 567, 573; 628 NW2d 502 (2001), a defendant's silence "at the time of arrest and after receiving *Miranda* warnings"³ "cannot be used as evidence to cast doubt on the defendant's credibility" *Id.* at 573, citing *Doyle v Ohio*, 426 US 610, 619; 96 S Ct 2240; 49 L Ed 2d 91 (1976). Defendant is entitled to *Miranda* warnings and, therefore, the protections of *Doyle* only if he is subjected to custodial interrogation. *People v Ish*, 252 Mich App 115, 118; 652 NW2d 257 (2002); *People v Schollaert*, 194 Mich App 158, 163; 486 NW2d 312 (1992) (prohibition on reference to defendant's silence does not apply to post-arrest, pre-*Miranda* silence).

In the present case, we find that defendant's due process rights were not violated because the record before us does not show that defendant was subjected to interrogation at the time of his initial arrest. Our review of the trial testimony shows only that defendant was taken to the sex crimes unit by Officers Caban and Salazar and then later released. Although Officer Caban testified that defendant's behavior was "cooperative" while he was in the squad car on January 21, 2000, the testifying officers did not indicate that defendant was questioned on that date. Additionally, defendant's response to Officer LaRosa's question, that he "wanted to avoid it," does not lead us to conclude that he was being interrogated and exercised his right to remain silent when he chose not to disclose the incident to the arresting officers. Accordingly, we find that no error occurred.

Defendant next argues that his counsel was ineffective when she failed to object to the introduction of Officer LaRosa's testimony. We disagree.

¹ *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973).

² In defendant's brief, he requests that this Court remand his case to the trial court for a *Ginther* hearing if we cannot find ineffective assistance of counsel on the record before us. This request is not a procedurally appropriate motion to remand. See MCR 7.211.

³ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. . . . Defendant must further demonstrate a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, *and* the attendant proceedings were fundamentally unfair or unreliable. . . . [Rodgers, *supra* at 714. (Citations omitted.)]

Because we have determined that the admission of Officer LaRosa's testimony did not violate defendant's due process rights, any objection lodged by his trial counsel on that basis would have been fruitless. Failure to advocate a meritless position is not ineffective assistance. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997).

Defendant similarly claims that his counsel should have requested a cautionary instruction regarding the jury's use of this evidence. However, counsel's actions are presumed to be sound trial strategy, and this Court will not second-guess matters of trial strategy. *People v Rice*, 235 Mich App 429, 444-445; 597 NW2d 843 (1999). Here, defendant has not overcome this presumption because such a request could have actually damaged defendant's case by emphasizing the incriminating nature of the statement defendant made to Investigator Sims and Officer LaRosa. Accordingly, defendant's claim is without merit.

Finally, defendant argues that the trial court erred by admitting the evidence and testimony concerning the condoms obtained from the victim by Officer Caban. Defendant argues that the evidence was irrelevant because the prosecution failed to lay a foundation that the condoms were used for intercourse with the victim. An adequate foundation for admitting real (as opposed to illustrative) evidence requires "testimony . . . that the object offered is the object that was involved in the incident." *People v White*, 208 Mich App 126, 130; 527 NW2d 34 (1994), citing 2 McCormick, Evidence (4th ed.), § 212, pp 7-8. Moreover, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401.

Here, defendant's assertion that there was no evidence that the condoms are related to the crime charged in count one is simply incorrect. Officer Caban testified that the victim reported to him that defendant had used the condoms. This testimony sufficiently tied the evidence to the incident. Additionally, the lay and expert testimony concerning the condoms certainly had probative value as to the charge that defendant had sexual intercourse with the victim. We also find that even if it was error to admit this evidence, the error did not affect defendant's substantial rights. The expert testimony on this issue actually favored defendant. Cathy Carr testified that if defendant had ejaculated as the victim claimed he did, some physical evidence of ejaculation would have been discovered on the condoms, but was not. The jury apparently accorded this testimony significant weight because it acquitted defendant on count one.

Affirmed.

/s/ Hilda R. Gage
/s/ Kurtis T. Wilder
/s/ Karen Fort Hood